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# In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 994.

ROBERT McCLELLAN,
*Plaintiff-Appellant,*

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,
*Defendant-Appellee.*

APPEAL FROM THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF OHIO, CUYAHOGA COUNTY.

## BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

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## BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

This Memorandum Brief is submitted to respond to certain allegations made in appellee's Motion to Dismiss and to bring to the Court's attention two judicial matters which arose subsequent to filing of the original Jurisdictional Statement in this case.

### APPELLEE'S MOTION TO DISMISS.

Appellee relies principally upon the decision of the Ohio Supreme Court in *Loftus v. Pennsylvania R. R.*, 107 Ohio St. 352, 140 N. E. 94 (1923). We submit that the decision was erroneous at the time that it was made more than forty years ago, since the authorities relied upon by the Ohio Supreme Court in fact require the opposite conclusion. See, e.g., *Missouri Pac. R. R. v. Clarendon Boat Oar Co.*, 257 U. S. 533 (1922); *Chambers v. B. & O. R. R.*, 207 U. S. 142 (1907), as modified by *Hughes v. Fetter*, 341 U. S. 609 (1951). It is appropriate to note that the appeal in

the *Loftus* case to this Court was dismissed by stipulation of both parties, presumably as a result of a settlement. See *Loftus v. Pennsylvania R. R.*, 266 U. S. 639 (1923). Further, subsequent decisions of this Court have emphasized the error of the Ohio court in the *Loftus* case.

## PRIVILEGES AND IMMUNITIES AND EQUAL PROTECTION.

The decision in *Missouri, ex rel. Southern Ry. v. Mayfield*, 340 U. S. 1 (1950) establishes that a state may apply the doctrine of *forum non conveniens* to bar a FELA action only if it applies "the doctrine for all causes of action begun in its courts." See *Id.* at 3. Ohio expressly rejects the doctrine of *forum non conveniens* as to all causes of action except those against railroads for injury to person or property. The refusal of Ohio courts to hear such a limited class of cases violates the Privileges and Immunities and Equal Protection clauses of the Fourteenth Amendment. *Miles v. Illinois Central R. R.*, 315 U. S. 698 (1942); *McKnett v. St. Louis & S. F. Ry.*, 292 U. S. 230 (1934). Defendant-appellee argues that this plaintiff would have a forum in some other state. However, the apparent congressional purpose has been found by this Court to include a choice of forum for the injured workman. See *Miles v. Illinois Central R. R., supra*, at pp. 706-708 (Mr. Justice Jackson concurring).

With respect to the special preferential treatment given to railroads, in violation of the Equal Protection Guarantee, appellee asserts that railroads are not the only transportation companies to which Ohio Revised Code Section 2307.37 now applies. Counsel for appellant is not aware of any stage coaches or any of the other forms of transportation specified in that statute which still operate in Ohio. Appellee does not now and has never suggested

any such form of transportation to which the statute applies, other than railroads. Contrary to the assertion by appellee in its Motion, no Ohio appellate court identified any such form of transportation (other than railroads) which are governed by this statute, during the course of oral argument, in any opinion, or otherwise. We must repeat that this section constitutes class legislation since it affords peculiar protection to railroads that is unquestionably not available to buses, trucks, taxis, ships, barges, or airplanes, let alone to corporations generally. This plaintiff is therefore being discriminatorily barred by a statute that attacks only claimants against railroads who were nonresidents of Ohio on a selected arbitrary date.

## SUPREMACY CLAUSE.

Contrary to appellee's assertion, on page 5 of its motion, considerable emphasis was placed by appellant in all the courts below on the fact that the court was dealing with a federally created right. It is interesting that appellee should cite as authority for Ohio's special deference to FELA claimants, the decisions in *Gallick v. Baltimore & Ohio R. R.*, 372 U. S. 108 (1963), and *Harris v. Pennsylvania R. R.*, 361 U. S. 15 (1959). While this appeal concerns Ohio's refusal to hear a whole class of FELA cases (nonresidents injured outside of Ohio), the two cited cases are hardly authority for Ohio's favorable treatment of FELA claimants generally. The Court will remember that in each of those cited cases the Ohio courts denied any right of recovery, and this Court reversed those rulings to afford a remedy to the injured workmen. The Ohio Railway Venue Statute is a direct challenge to the supremacy of federal law by Ohio's refusal to entertain a large group of such actions under this federally established cause of action.

## NEW JUDICIAL DEVELOPMENTS.

Subsequent to the filing of appellant's Jurisdictional Statement, this Court decided the case of *Burnett v. New York Central R. R.*, 33 L. W. 4298 (October Term, No. 437, decided April 5, 1965). In that case this Court was concerned with the Ohio Railway Venue Statute and its effect on the limitations period established by the Federal Employers Liability Act. Because of the legal circumstances in which that case arose, this Court was not there called upon to decide the constitutionality of the Ohio statute. Footnote 1 to the Opinion reads as follows (33 L. W. 4298):

> "Counsel for petitioner stated at oral argument that the constitutionality of this special venue provision for actions against railroads was being challenged in other litigation. No constitutional issue was raised in these proceedings, and we express no views upon any such question."

The "other litigation" referred to in that oral argument is the present case. This Court has expressly reserved determination of the constitutionality of the statute, and we submit that review at this time is appropriate.

Second, counsel for appellee refers to the recently filed action of *Buchanan, et al. v. Rhodes, et al.* (N. D., Ohio, C65-159) which was commenced after the Jurisdictional Statement was filed in the present case. In the *Buchanan* case, counsel for the present appellant has sought a judicial reapportionment in Ohio, similar to the legislative reapportionment that this Court ordered for Ohio and other states. The appellee railroad cites the *Buchanan* case as a demonstration that the Common Pleas Court for Cuyahoga County is already overworked. The gravamen of the complaint in the *Buchanan* case is that there should be a reapportionment of judges among the

Ohio counties since Cuyahoga County (Cleveland, Ohio) has roughly one-seventh the number of judges per unit of population as certain rural counties. The argument of appellee in this case is that *no* Ohio county should entertain the present lawsuit, so that appellee can draw small solace from an attempt to equalize the judicial representation in Ohio counties.

While the *Buchanan* case may in due course come before this Court, its legal effect on the present proceedings is at best premature. Further, counsel for the appellant in this case, who is also counsel for the plaintiff in the *Buchanan* case, finds no inconsistency in attempting to cure two separate evils: Ohio's refusal to entertain this broad class of FELA actions in violation of federal constitutional rights, and Ohio's failure to provide equal protection and due process for its own residents. In any event, we are constrained to remind appellee that two wrongs do not make a right.

## CONCLUSION.

For the reasons stated in the original Jurisdictional Statement and amplified above, appellant respectfully asks this Court to overrule the Motion to Dismiss the Appeal and to note probable jurisdiction in this case.

Respectfully submitted,

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